No. [redacted] 213 October Term, [redacted] 192[redacted]

IN THE

Supreme Court of the United States

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,
Petitioner,

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

JOHN T. BRADY,
CHARLES HEEBNER,
Counsel for Petitioner,
No. 18 N. Third St.,
Harrisburg, Pa.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924. NO.

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY, *Petitioner,*

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

To the Honorable, the Supreme Court of the United States:

The petition of Reading Company respectfully shows to the Court as follows:

1. The question of law involved in this case is as follows:

> In an action against an interstate carrier, instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

2. This is an action in trespass instituted in the Court of Common Pleas of Dauphin County, Pennsylvania, on February 6, 1922, by John L. Koons, Administrator of Lester M. Koons, against the Philadelphia & Reading Railway Company to recover for the death of the said Lester M. Koons, who, while in the employ of the said Company at a place commonly known as Rutherford Yards, Dauphin County, Pennsylvania, on or about the 22nd day of April, 1915, sustained injuries from which he died on the same day or in the early hours of the 23rd of April, 1915. The suit was brought under the provisions of the Act of Congress of April 22, 1908, c. 149 (35 Stat. 65, U. S. Compiled Stats. 1916, Section 8657) entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," for the benefit of the surviving parents, John L. Koons and Malinda D. Koons, the said John L. Koons being the Administrator of the estate. The case involves the construction of Section 6 of the said Act of Congress of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143 (35 Stat. 66, 36 Stat. 291; U. S. Compiled Stats. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

3. On April 20, 1916, the said John L. Koons and Malinda D. Koons, as surviving parents of the said Lester M. Koons, brought their action against the Philadelphia & Reading Railway Company in the Court of Common Pleas of Dauphin County, to recover for the death of said Lester M. Koons, the suit being under the statutes in force in the Commonwealth of Pennsylvania. In that action, before the close of plaintiffs' case, defendant specifically called attention to the fact that both the Company and the deceased were

engaged in interstate commerce at the time Koons met his death, and that therefore the only right of action was under the Federal Employers' Liability Law, which required that the suit be in the name of a personal representative. No motion to amend with respect to the parties plaintiff was made, the plaintiffs electing to stand on the suit as brought, contending that the decedent was not engaged in interstate commerce at the time of the accident. In this proceeding, the trial court on April 3, 1920, entered judgment in favor of the defendant n. o. v. on the ground that decedent had been so engaged in interstate commerce when injured and that there could be no recovery in a suit instituted by his surviving parents. This judgment was affirmed by the Supreme Court of Pennsylvania on appeal on July 1, 1921, the decision being reported in 271 Pa. 468, 114 Atlantic 262. It was thus definitely determined that any recovery for the death of the said Lester M. Koons could be had only under the provisions of the Federal Act.

Thereafter, on September 23, 1921, the said John L. Koons, the father of decedent, and one of the plaintiffs in the above recited proceedings, took out letters of administration on the estate of his son, and on February 6, 1922, more than six years after the death of the said Lester M. Koons, brought this suit.

The defendant thereupon presented its petition, setting forth all of the pertinent facts and praying that judgment of non pros. be entered for the reason that the action, instituted more than two years after the date of death, was barred by the limitation contained in the Act of Congress, upon which petition a rule was granted upon plaintiff to show cause why the judgment prayed for should not be entered. Plaintiff answered, averring that the action was commenced within two years from the date the cause of action accrued, and praying that the rule be discharged. After

argument the Court of Common Pleas discharged the rule absolutely and overruled the motion for judgment of non pros., holding that the limitation contained in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator and that the action was commenced within the statutory period after such appointment.

When the case came on for trial on the merits, plaintiff and defendant stipulated of record that, subject to the legal question involved, under the exception noted, with the right of appeal reserved, a verdict should be taken in favor of the plaintiff and against the defendant in the sum of $2510. Accordingly a verdict was rendered in the amount stated, upon which, on October 23, 1923, judgment was entered, from which an appeal was taken to the Supreme Court of Pennsylvania, which Court on October 6, 1924, affirmed the judgment of the Court of Common Pleas. On October 25, 1924, the Supreme Court refused a petition for reargument.

4. That after the above recited judgment had been entered against the said Philadelphia & Reading Railway Company, and after an appeal had been taken to the Supreme Court of Pennsylvania, the said Philadelphia & Reading Railway Company was on December 31, 1923, merged with Reading Company, your petitioner, under the final decree of the United States District Court for the Eastern District of Pennsylvania, pursuant to the mandate of your Honorable Court in the case of United States of America *vs.* Reading Company, et al., 253 U. S. 26, and that under the merger agreement the said judgment is an obligation of your petitioner.

5. Your petitioner avers that the judgment of the Supreme Court of Pennsylvania is the judgment of the highest court of the Commonwealth of Pennsylvania and is final, and denies to your petitioner a right, priv-

ilege and immunity under the limitation clause of the Federal Employers' Liability Act, which was duly set up and claimed in the Court of Common Pleas of Dauphin County and in the Supreme Court of Pennsylvania.

6. Your petitioner presents herewith as part of this petition a certified copy of the record, including the proceedings in the Supreme Court of Pennsylvania.

7. That the question involved has not been passed upon by your Honorable Court, although it seems to have been taken for granted in Mo. K. & T. Co. *vs.* Wulf, 226 U. S. 570, that the limitation began to run from the time death occurred and not from the time letters of administration were taken out.

8. That the Circuit Court of Appeals for the First Circuit in American Railroad of Porto Rico *vs.* Coronas, 230 Fed. 545 (1916) and the Circuit Court of Appeals for the Third Circuit in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway Company,— 1 Fed. (2d) 85 (1924), have held that a cause of action for death under the Act does not accrue until the appointment of a personal representative, and the Supreme Court of Pennsylvania in affirming the judgment in the present case, solely because it required the interpretation of the Federal statute, followed the construction placed upon the limitation clause by the Federal Courts in the cases cited; that your petitioner is advised that the judgment of the Circuit Court of Appeals for the Third Circuit in the Guinther case is not such a final order as will permit a review of the decision by your Honorable Court at this time.

9. That by the provisions of Section 6 of the Federal Employers' Liability Act, as amended by the Act of April 5, 1910, c. 143, Sec. 1. (36 Stat. 291, U. S. Compiled Stats. 1916, Sec. 8662) the jurisdiction of the Courts of the United States is concurrent with that of the Courts of the several states; that there is a con-

flict between the decisions of the Federal Courts of Appeal and the State Courts construing the limitation clause of the Act, as at least two State Courts of last resort, the Supreme Court of Kansas in Giersch *vs.* A. T. & S. F. R. R. Co., 171 Pac. 591, (1918), and the Supreme Court of Georgia in Seaboard Air Line *vs.* Brooks, 107 S. E. 878 (1921), declined to follow the doctrine announced by the Circuit Court of Appeals for the First Circuit in the Coronas case (the Guinther case not yet having been decided), and took the contrary view that the cause of action accrued upon the death of the employe.

10. Your petitioner is advised that the Supreme Court of Pennsylvania was in error in affirming the judgment entered in this case, for the reason that the Federal Employers' Liability Act created a new liability, gave an action to enforce it unknown to the common law, and fixed the time within which that action must be commenced, and the limitation clause contained in that Act is not the ordinary statute of limitations dealt with in the cases relied upon as authority by the Federal Courts of Appeal. As the action was not commenced within two years from the date of death, the day the cause of action accrued, it was barred by the statute, and unless your Honorable Court shall correct the error of the court below, your petitioner will be deprived of immunity under the limitation clause of the said Act in this case, and it, as well as all other interstate carriers, will be denied immunity in all similar cases hereafter brought in the State of Pennsylvania.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Pennsylvania, commanding that court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the rec-

ord and all proceedings of the said Supreme Court of Pennsylvania in the said case, which was entitled in that Court, John L. Koons, Administrator of Lester M. Koons, *vs.* Philadelphia & Reading Railway Company, Appellant, Middle District of Pennsylvania, No. 11 May Term, 1924, to the end that the said case may be reviewed and determined by your Honorable Court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper, and that the said judgment of the said Supreme Court of Pennsylvania may be reversed by this Honorable Court.

Reading Company,
By
J. V. Hare,
Secretary.

Chas. Heebner,
Counsel for Petitioner.

State of Pennsylvania,
City of Philadelphia, } *ss:*

J. V. Hare, being duly sworn, says that he is Secretary of Reading Company, petitioner above named, that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

J. V. Hare.

Sworn and subscribed to
before me this 25th day
of November, 1924.

Albert W. Tuttle
Notary Public
Commission expires March 26, 1927.

[Seal]